SUPREME COURT, U. S.
Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1136

JIMMIE SHARP,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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INTRODUCTION

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on November 14, 1975.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unreported and is printed at Appendix A

hereto. The Judgment of the District Court for the Northern District of California is printed at Appendix B hereto.

JURISDICTION

The opinion printed in the Appendix A hereto, which is sought to be reviewed, is dated November 14, 1975. This petition for certiorari was filed less than 90 days from said date. The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

Petitioner brought suit under the Federal Tort Claims Act for failure of the agents of the United States to comply with and follow the Federal Employees Compensation Act (5 United States Code Section 8101 et seq.) for more than seventeen years. The questions thereby arising are:

1. Whether petitioner's action was for a compensable wrong under the Federal Tort Claims Act independent of the exclusive remedy provisions contained in the Federal Employees Compensation Act.

2. Whether the decision of the United States after seventeen years to properly accord petitioner the benefits of the Federal Employees Compensation Act affects the right of petitioner to sue for the wrong visited upon him for the preceding seventeen years

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which caused injury independent of the original work related injury.

STATEMENT OF FACTS

Petitioner entered employment with the United States, on or about October 17, 1952 at the U.S. Naval Air Station, Alameda and worked in overhaul and repair of aircraft engines. On August 12, 1954 petitioner complained of an occupational injury to his back resulting from lifting of aircraft engine parts and obtained medical treatment from his private doctors. Upon his return to work the United States' medical doctor recommended on August 23, 1954 that petitioner be placed on limited duty.

However, the United States reassigned petitioner to his regular duties, failing to admit of, or care for, petitioner's occupational injury, despite his protests, as was its duty under the Federal Employees Compensation Act.

During the ensuing two and one-half years petitioner was required to carry out his regular duties involving stooping, bending and lifting contrary to the recommendations of the United States doctors. Petitioner protested this reassignment to his superiors to no avail. Petitioner suffered two hospitalizations for emotional disturbance associated with this work assignment. His initial claims in 1954 and 1959 for disability were rejected as not work related or compensable.

In 1963, petitioner retired because of his disability and filed a claim for a total disability pension due to

his original occupational injury of 1954. This claim was denied by the United States until, in 1971, more than seventeen years after the initial injury, the United States found the injury was work related and compensable under the Federal Employees Compensation Act. Petitioner received $64,048.00 through 1974 of which the Civil Service Commission had a lien for $23,749.00 for prior payments. He now receives regular disability pension.

There was never any conflict in the evidence that petitioner's initial injury on August 12, 1954 and growing aggravation of that injury thereafter was work related. On February 14, 1957, a United States medical officer stated (Record, page 70):

> On *24 August 1954* a physical valuation was accomplished by the Medical Officer. It was revealed that Mr. Sharp has a congenital Low back abnormality of the spine which presents a problem of especial susceptibility to strains, sprains, and back aches. At that time [August 24, 1954] it was recommended that Mr. Sharp be assigned duties which did not necessitate frequent bending and stooping. This recommendation *is reaffirmed at this time.* (emphasis added)

Between 1954 and 1957 this advice of the government Medical Officers was not followed, and at the time of petitioner's disability retirement in 1963 the duty under the Federal Employees Compensation Act to cure or relieve petitioner's condition had been continuously breached by the United States.

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In 1963 petitioner received an early disability retirement. Finally, seventeen years after the injury the United States Department of Labor found that the injury was work related and compensable. Petitioner has suffered from emotional illness requiring intermittent hospitalization since 1956.

The June 7, 1971 statement of Richard I. Meyers, M.D., Medical Director, (Record, page 75) which finally led to a compensation award discloses the duty of the United States of America, the breach of that duty, and the resulting new injury and damages suffered by Jimmie Sharp requiring hospitalization for psychotic breaks:

> The file shows that prior to this injury the claimant had no evidence of emotional illness. He was advised by a physician to perform light duties only, which apparently the agency did not recognize for several years. During the interim the claimant continued with the same position as before the injury, working with pain according to the medical report from Celia Lee, M.D., who treated the claimant while in the V.A. Hospital. It is her opinion that the claimant's schizophrenic reaction was precipitated by the physical pain in the back and legs and his concern over his job placement at the Naval Air Station. Doctor Lee is quite familiar according to the record, with reports from the Naval Air Station and private physicians as well as her personal treatment while he was in the V.A. Hospital. I am, therefore, in complete agreement with the opinion of Doctor Lee that the claimant's psychotic breaks were, in part at least, related to the back condi-

tion, the chronic pain, his concern regarding income, transfer of jobs, etc. . . .

REASON FOR GRANTING WRIT

EXCLUSIVITY OF REMEDY AS APPLIED IN THIS CASE VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Petitioner, an employee of the United States, was entitled as of legislative right to the full benefits of the Federal Employees Compensation Act (5 USC §8101 et seq.). As a worker injured in the course and scope of his employment, petitioner was entitled to compensation and medical treatment to relieve or cure the effects of his disability.

In the case at bench petitioner not only was denied compensation, but the directions of the medical officer for limited duty to cure or relieve the effects of the injury were ignored for two and one-half years, August 1954 to February 1957. During this period petitioner's congenital anomaly of his lower spine became inflamed, remained painful and petitioner suffered two hospitalizations for emotional illness.

The Federal Employees Compensation Act was intended to provide a broad and comprehensive plan for compensation of injured government employees. *U.S. v. Browning* (9th Cir. 1966) 359 F.2d 937.

Title 5 U.S.C. §8116(*c*) provides:

"(c) The liability of the United States or an instrumentality thereof under this subchapter or

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> any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judiciai proceeding under a workmen's compensation statute or under a Federal tort liability statute. However this subsection does not apply to a master or a member of a crew of a vessel."

Workers Compensation Acts such as the Federal Employees Compensation Act are liberally construed in accordance with the legislative intent that humane purposes be accomplished. *Pittman v. U.S.* (E.D.Va. 1970) 312 F. Supp. 818, 819.

The Congress could not have intended that a governmental employee be denied all rights of compensation under the Federal Employees Compensation Act as was done in this case for seventeen years and, at the time time, deny the injured worker a cause of action under the Federal Tort Claims Act, 28 USC §1346(b), §§2671-2680 for the new and additional injuries.

The emotional illness and exacerbation of the spine were caused by the failure of the United States to accord compensation and medical treatment as required under the Federal Employees Compensation Act.

Though the language of 5 USC §8116(c) appears clear in its reach, the Congress' legislative sweep is limited by the due process guaranty of the Fifth Amendment to the United States Constitution which declares that "no person shall . . . be deprived of life, liberty, or property, without due process of law; . . ." U.S. Constitution 5th Amendment.

There is no question that the enactment of 5 USC §8116(c) is within the constitutional scope of legislative authority of the Congress. But due process under the 5th Amendment implicitly mandates that the law be reasonably applied consonant with the purpose of the legislation itself.

Petitioner has not received due process of law. Petitioner's right to receive the benefits of the Compensation Act was unreasonably and arbitrarily denied over the course of two and one-half to nine years.

This wrong visited on petitioner caused new and additional injury and was directly contrary to the purpose of the congressional legislation. Petitioner now seeks redress for this unconstitutional deprivation of his property rights under the Federal Tort Claims Act and he is met by the mechanistic incantation, "exclusivity of remedy," not that the wrong did not occur; not that he was not injured anew thereby; not that he could not state a Tort cause of action—but "exclusivity of remedy."

Due process insures the fair and orderly administration of the laws.

To permit the United States to envelop itself in the protective immunity designed by Congress would

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reward the acknowledged wrongdoer and punish the hapless victim by allowing no remedy for deprivation of his property rights under the Federal Employees' Compensation Act.

Even if the Congress could have intended such a result the due process Clause of the Fifth Amendment to the U.S. Constitution requires that the statute, 5 USC §8116(c), as applied in this case, is arbitrary, unreasonable and unconstitutional, and must give way to petitioner's right to fashion a remedy under the Federal Tort Claims Act, 28 USC §1346(b), §§2671-2680.

The courts continually protect the legal rights of employees where the rule of exclusivity threatens to eliminate substantive remedies for actual wrongs not governed by the specific conditions of the Compensation Acts themselves.

Thus, in *Unruh v. Truck Insurance Exchange* (1972) 7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P. 2d 1063, the Court refused to exempt a compensation insurer from an action at law under the exclusivity rule where the wrongful actions of the insurer *were separate from the industrial accident, and separate from the insurer's responsibility under the industrial accident itself.* The Court stated at 7 Cal. 3d 630:

> [W]e are unable to conclude that a compensation insurer *remains within its proper role* as such, when, as in the instant case, through its agents or others employed by it, such insurer intentionally embarks upon a deceitful course of conduct in its investigations which causes injury to the subject of the investigation. We cannot

> give our approval to such misconduct which tramples upon the employee's rights, . . . (emphasis added)

The Court said at page 634:

> However we have held that as to the second, fourth, and fifth counts defendant Truck did *not* remain within its proper role as a compensation carrier. Thus, under the facts pleaded in those intentional tort counts, Truck was and is actually a "person other than the employer" (Labor Code Section 3852), against whom plaintiff is entitled to bring a Civil action for damages.

Section 3850 (b) of the California Labor Code provides:

> "Employer" includes insurer as defined in this division.

There is no doubt that the United States is also the insurer of the Employees' Compensation Fund.

5 USC Section 8147 provides in part:

> (a) There is in the Treasury of the United States the Employees' Compensation Fund . . . The fund is available without time limit for the payment of compensation and other benefits and expenses . . . authorized by this subchapter.

As an insurer under the *Unruh* doctrine the United States would be "a person other than the employer" if the allegation is of an intentional tort, which is so alleged in the instant case at paragraph VIII of the petitioner's complaint (Record, page 3):

> ". . . In spite of plaintiffs protestations, defendants negligently and wilfully reassigned plaintiff

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to the production line contrary to the directions of the medical officer for a period of nine years."

Federal Rules of Civil Procedure Rule 8 provide:

> . . .
>
> (e)
>
> (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motion are required.
>
> (2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses . . .
>
> (f) All pleadings shall be construed as to do substantial justice.

Pursuant to the *Unruh* rule heretofore set forth it is contended that the apparent exclusive remedy under 5 USC §8116(c) is modified where, as here, the victim employee was powerless to change his job assignment and the safety orders designated for the health and safety of the employee were intentionally avoided and violated at least for 3 years and there is evidence that the restrictive duty schedule was not followed as late as eight and one-half years after the initial injury.

In spite of the admonition of the Court of Appeals in *Flippo v. T.V.A.* (5th Cir. 1973) 486 F.2d 612, 613 affirming an order denying relief based on exclusivity of remedy that "nothing new has been added, nothing new need be stated, so nothing new be ordained," it is respectfully suggested that despite the failure of such

litigation urging exception to the exclusivity doctrine for the last twenty-six years, this immunity was not intended to create a climate where *new* wrongs go without remedy.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeal for the Ninth Circuit entered on November 14, 1975.

Dated, Oakland, California,
February 10, 1976.

Respectfully submitted,
DONALD P. MCCULLUM,
CHARLES O. TRIEBEL, JR.,
Attorneys for Petitioner.

(Appendices Follow)

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Appendix A

DO NOT PUBLISH

United States Court of Appeals
for the Ninth Circuit

No. 74-3080

Jimmie Sharp,
Plaintiff-Appellant,
vs.
United States of America,
Defendant-Appellee.

[November 14, 1975]

Appeal from the United States District Court
for the Northern District of California

MEMORANDUM

Before: WRIGHT and SNEED, Circuit Judges,
and TAYLOR, District Judge.*

Appellant seeks damages of $2½ billion under the Federal Tort Claims Act [28 U.S.C. § 1346(b), §§ 2671-2680] for the government's allegedly negligent failure to provide him compensation due under the Federal Employees Compensation Act. [5 U.S.C.

*Honorable Fred M. Taylor, Senior United States District Judge, District of Idaho, sitting by designation.

§ 8101, *et seq.*] The district court dismissed the complaint and we affirm.[1]

Appellant, a former civilian employee of the United States Navy, injured his back on the job, received medical attention, and after a short period of recuperation returned to his former duties. Despite his protests to the contrary, the injury was not classified as occupational and appellant was forced to provide further medical care on his own. Although the original government medical examination suggested that appellant be assigned less physically demanding work due to his medical condition, this was not followed until more than two years after the injury.

Nine years later, having received an early disability retirement, appellant filed a claim for a total disability pension. Finally, 17 years after the injury, the Department of Labor re-examined his case, found that the injury was work related and compensable and awarded appellant the maximum compensation to which he was entitled, including $64,048 for the period prior to the re-examination.

Decisions of the Secretary of Labor or his designee as to payments under the Federal Employees Compensation Act are final and not subject to review. 5 U.S.C. § 8128(b); *Sodeman v. United States Civil Service Commission,* 313 F.2d 694 (9th Cir. 1962).

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[1]An order dismissing the complaint and not the action is not ordinarily appealable. *Dockery v. Dockery,* 437 F.2d 898 (9th Cir. 1971). Where, as here, it appears that the action could not be saved by any amendment of the complaint which appellant could reasonably be expected to make, it will be treated as a final order. *Lanning v. Serwold,* 474 F.2d 716, 717 n.1 (9th Cir. 1973).

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Although the 17-year delay in appellant's receipt of compensation is regrettable, both the initial determination to deny compensation and the subsequent reversal of that determination are not reviewable. The Federal Tort Claims Act cannot be employed by appellant to circumvent this bar to judicial review.

Any claim stated by appellant for damages resulting from the government's initial failure to treat his injury as compensable under the Act or from the failure to assign him to less physically demanding duties were also properly dismissed. Federal employees who sustain injuries during the performance of their duties must look to the Federal Employees Compensation Act for recovery and the remedies provided thereunder are exclusive. 5 U.S.C. § 8116(c); *Noga v. United States,* 411 F.2d 943 (9th Cir. 1969).

AFFIRMED.

Appendix B

In the United States District Court
for the Northern District of California

Civil No. C-74-0645-SW

Jimmie Sharp,
Plaintiff,
vs.
United States of America, et al.,
Defendants.

[Filed Sep. 12, 1974]

JUDGMENT

This cause having come on for hearing on September 12, 1974, upon Defendants' Motion to Dismiss (or in the alternative) Motion for Summary Judgment, and the matter having been submitted to the Court, both on the written record and based upon oral arguments by Counsel, and the Court being fully advised in the premises, and the matter having been submitted for decision, the Court entered its Order on that date, granting the Motion to Dismiss (or in the alternative) Motion for Summary Judgment in favor of the Defendants, United States of America, and against Plaintiff Jimmie Sharp.

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It Is Hereby Ordered, Adjudged and Decreed that:

1. The Plaintiff take nothing by his Complaint and that Judgment be entered for the Defendants and against the Plaintiff, Jimmie Sharp.

2. Each party shall bear its own costs.

Dated:

Approved as to Form:

.....

/s/ Spencer Williams
United States District Judge